Supreme Court, U.S.
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No. 91-617

In The
Supreme Court of the United States
October Term, 1991

THE CHRISTIC INSTITUTE
Petitioner,

versus

John HULL, Richard Secord, Albert Hakim, Thomas Clines, Adolfo Calero, Robert Owen, John Singlaub, Theodore Shackley, Rafael "Chi Chi" Quintero, Ronald Joseph Martin, Sr., Mario Delamico, James McCoy, Moises Nunez, and Jorge Gonzalez,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER THE CHRISTIC INSTITUTE'S REPLY TO THE RESPONDENTS' JOINT CONSOLIDATED BRIEF IN OPPOSITION

Eugene R. Scheiman
805 Third Avenue
New York, New York 10022
(212) 702-5700
Counsel of Record

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STATUTES AND RULES

28 U.S.C. §1927 . . . . . *passim*

Fed. R. Civ. P. 11 . . . . . *passim*

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Local Rule 10.B.1. 4

PETITIONER CHRISTIC INSTITUTE'S REPLY TO THE RESPONDENTS' JOINT CONSOLIDATED BRIEF IN OPPOSITION

I. The Decision by the Court Below Squarely Conflicts with This Court's Decision in *Pavelic*

At this late stage in the appellate process, respondents finally acknowledge, as petitioners have repeatedly asserted, that the Christic Institute's liability under 28 U.S.C. §1927 is insupportable. However, respondents persist in their attempts to justify the equally insupportable liability of the Christic Institute under Rule 11 and the bad faith exception to the American Rule.

The ruling of this Court in *Pavelic & LeFlore v. Marvel*, 493 U.S. 120 (1989) is clear: Rule 11 does not authorize a court to sanction the law firm of an attorney who signs a paper in violation of Rule 11. Respondents attempt to circumvent Pavelics' prohibition against law firm liability by asserting for the first time that the Christic Institute was the "real party in interest" and thus liable under Rule 11 as a "represented party": "[i]n a very literal sense, the Christic Institute (not plaintiffs) was always the real party in interest in this litigation . . . ." (Respondents' Brief in Opposition 16.) Had respondents actually believed the Institute to be the real party in interest, they should have motioned to have the firm designated as one. Fed. R. Civ. Proc. 19. Of course, the motion would have failed, just as respondents argument fails. As respondents correctly assert in another section of their brief, Pavelic is based on a textual interpretation of a written rule that sets forth with "extreme care" the persons who may be sanctioned for violation of Rule 11. This "plain meaning" concept of statutory construction on which *Pavelic* is based precludes the imposition of Rule 11 sanctions against the Christic Institute. The Christic Institute was the law firm of plaintiffs' counsel, not a represented party, and, as such, is not liable under Rule 11.

To bolster the characterization of the Christic Institute as the real party in interest, respondents list conduct (fund-raising, *pro bono* representation, pursuit of a political agenda) by the Institute which is descriptive of all public interest legal organizations. Indeed, respondents real party in interest argument is but an *ex post facto* attempt to manufacture some basis in law for a sanction based on obvious jurisprudential animus to public interest litigation. The record in this case is permeated with the attitude that the federal judiciary should not be utilized as a forum for the vindication of public justice. In essence, respondents are claiming that the bad faith sanction was proper because petitioner Christic Institute improperly brought this case in pursuit of their own goals and political objectives. But the bringing of an action which is political in nature in order to further the goals and objectives of a nonprofit public interest law firm is perfectly appropriate and indeed is to be zealously protected for the benefit of all society. In *NAACP v. Button*, 371 U.S. 415, 429-30 (1963), this Court held that litigation is a form of political expression deserving of full First Amendment protections. See also *In re Primus*, 436 U.S. 412 (1978). Whatever the judicial antipathy toward public interest litigation may be, until this Court modifies or overturns its clear precedent endorsing the role of public interest litigation, it should not countenance the use of Rule 11 as a tactic to deter such litigation.

II. The Violation of Petitioner's Due Process Rights Require Corrective Measures By This Court.

A. The Findings by the Court Below Are Grossly Deficient

Resigned finally to the insupportability of their arguments, respondents propose that even if neither §1927 nor Rule 11 support sanctions against petitioner, the sanctions were imposed "coextensively" (pursuant to Rule 11,

§1927 and the bad faith exception to the American Rule) and thus the entire award is warranted under the bad faith exception. The basis of this argument is itself grounds for reversal. A district court may not impose a lump sum sanction of the enormity encountered here without any indication of the perceived misconduct or the sanctioning authority invoked to punish it. As the Third Circuit recently explained:

> [T]he court did not identify and relate the violations to each source of authority in a way that would permit meaningful appellate reveiw with respect even to Rule 11. This infirmity is a critical obstacle because Rule 11 and §1927, while probably duplicitous to some extent, cover different actions in a lawsuit and require the application of disparate standards of proof.

Jones v. Pittsburgh National Corporation, 899 F.2d 1350, 1358 (3rd Cir. 1990).

Respondents brief is filled with *ex post facto* rationalizations of why they believe the bad faith sanction against petitioner Christic Institute should be sustained. Respondents should not be allowed to substitute their determination of the facts for those of the district court and panel. Neither the district court nor the panel made adequate findings of either the specific conduct being sanctioned or the bad faith motive which allegedly constituted the basis of petitioner's perceived bad faith.

Respondents only plausible argument for sustaining the Eleventh Circuits' affirmance of bad faith sanctions against petitioner Christic Institute is that it accords with *Glass v. Pfeffrer*, 849 F.2d 1261 (10th Cir. 1988). That case, decided before this Court's ruling in *Pavelic*, based its approval of bad faith sanctions against a law firm on *Calloway v. Marvel Entertainment Group*, 650 F.Supp. 684 (S.D.N.Y. 1986), the district court decision specifically reversed in *Pavelic*.

B. Petitioner Was Improperly Denied a Hearing

Respondents claim that because petitioner did not request a hearing pursuant to Local Rule 10.B.1., it waived its right to a hearing. That Rule provides in relevant part: "A *party* who desires oral argument or a hearing of any motion shall request it in writing. . . ." Petitioner Christic Institute was not, at the time, a party, nor was it represented by counsel. The rule therefore did not apply to petitioner and petitioner's failure to avail itself of the Rule may not be viewed as an informed waiver of its right to a hearing. For a waiver of a constitutional right to be effective it must be clearly established that there was an intentional relinquishment of a known right. *Brookhart v. Janis*, 384 U.S. 1,4 (1966). Respondents have made no such showing; consequently, the strong presumption - established by this Court - against waiver of a constitutional right applies to petitioner. See *id.*

CONCLUSION

For the foregoing reasons and those presented in the Petitions for Certiorari, we respectfully urge this Court to grant review and reverse the one million dollar sanction imposed against the petitioner Christic Institute.

December 31, 1991

Respectfully submitted,

Eugene R. Scheiman
805 Third Avenue
New York, NY 10022
(212) 702 5700
Counsel of Record